

JUN 24 1968

No. 22,338

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
vs.	
CONTINENTAL NUT COMPANY,	
<i>Respondent.</i>	}

On Petition for Enforcement of an Order of
the National Labor Relations Board

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Respondent respectfully petitions this Honorable Court for a rehearing, *en banc*, from the decision of this Court dated May 22, 1968.

I

The Court states that:

“The Regional Director made a full investigation . . .” (Opinion, p. 3)

* * *

“The employer . . . [does not assert] that the Regional Director in making his determination was arbitrary or capricious or that his determination was not in conformity with . . . the provisions of the Act.” (Opinion, p. 4)

The above-quoted statements are erroneous. Respondent argued that the Regional Director’s failure to investigate all of the relevant facts, and particularly the *sole* crucial fact in issue, was arbitrary and capricious. (Brief, p. 4) Respondent also argued that certain of the Regional Director’s *legal* determinations were not in conformity with the provisions of the Act. (Brief, p. 18)

II

Respondent argued that the Regional Director’s *legal* determinations, which were argued to be erroneous, were subject to review by this Court, based upon *NLRB v. Hood Corporation*, 346 F.2d 1020. (Brief, p. 6) The Court cited the *Hood* case for the proposition that in “such circumstances” the Regional Director’s determination cannot be overturned by a court. (Opinion, p. 4) In view of the fact that “such circum-

stances" referred to the Court's erroneous understanding of the issues presented, it seems clear that the Court's analysis of the *Hood* case is inapposite to any issue in this case.

III

The Court states that:

"The purpose of the courts in refraining from reviewing determinations made by Regional Directors on objections to Labor Board elections is discussed in *N.L.R.B. v. J. W. Rex Co.*, 243 F.2d 356, 358 (CA 3). That purpose is, of course, to provide for the final settlement without delay of disputes concerning objections to such elections. When the parties have, as in the instant case, entered into a consent election agreement, they have done so for the purpose expressed by the court in the *Rex* case." (Opinion, p. 4)

This statement is inaccurate. First, the holding attributed to the *Rex* case is not supported by the opinion in that case. Secondly, the "purpose" of the courts in reviewing determinations made under consent election agreements should be to interpret such agreements and apply the agreements, or other legal principles, to the issues presented for decision. The "purpose" or object sought to be achieved *by the parties* to such agreements should not be permitted to circumscribe the limits of judicial review. Thirdly, there are no facts in this record as to the parties' "purpose" and this Court is not in a position to state, as a matter of *law*, the "purpose" which induces employers and unions to enter into consent election agreements. An

employer and union may enter into such an agreement for various reasons and this Court may not assume, much less categorically state, that *all* parties enter into such agreements for a specific purpose and, based upon that assumption, deny a party effective judicial review.

IV

The Court states that the Respondent is:

“. . . seeking to narrow the powers of the Regional Director, . . .” (Opinion, p. 5)

The Respondent is not seeking to narrow the powers of the Regional Director, but is seeking a determination of his *duties* and judicial review of *legal* determinations made by the Regional Director. It was argued that the Regional Director failed to discharge his duties under the agreement (Brief, p. 4) and that the *legal* determinations which are challenged in this case are not “final” under the terms of the consent election agreement and the Board’s Rules and Regulations. (Brief, p. 9)

V

The Court states that the Respondent’s:

“. . . theory is that its objection is based upon a question of fact decided erroneously by the Regional Director and that questions of fact are not included within this court’s language, ‘procedural and substantive,’ used in the Hood case.” (Opinion, p. 5)

We must confess that we are at a loss to understand the basis for the foregoing statement. Our Brief

contains no assertion that the Regional Director made an erroneous finding of fact, nor can we find any language from which the Court could have drawn the inference that we were challenging findings of fact. On the contrary, Respondent repeatedly asserted that only *legal* determinations of the Regional Director were being challenged. Respondent also challenged the Regional Director's failure to fully investigate the facts and make findings of fact based thereon, but no factual finding that the Regional Director did make was challenged.

The language quoted above also attributes to Respondent certain arguments based upon the words "procedural and substantive" as used in the *Hood* case. Respondent made no argument in its Brief to the Court based upon the words "procedural and substantive", although it did make such an argument in its Answer in Opposition to Petitioner's Motion for Preliminary Relief. The Court's statement, if it is based upon the argument set forth in the Answer, is inaccurate because we there argued that "procedural and substantive" *did* encompass matters of *fact* or procedure. (Answer, p. 18) In substantiation of this argument we quoted from the Board's Rules and Regulations and underlined for emphasis the language authorizing the Regional Director to ascertain the "facts". We continued by arguing that the Regional Director's "legal interpretations are given no protection by virtue of the execution of a consent election agreement." (Answer, p. 19) At no point in our Answer did we assert that the Regional Director made

erroneous findings of fact or that questions of fact are not included within the language “procedural and substantive”.

VI

The Court’s opinion is not responsive to the issues presented on this appeal. The thrust of Respondent’s Brief and oral argument before this Court was that the Regional Director, based upon erroneous *legal* determinations, did not carry out his duties pursuant to the consent agreement, in that he did not investigate and make certain factual determinations which are crucial to the proper resolution of this case.

For the foregoing reasons, we respectfully submit that this Petition for Rehearing should be granted.

Dated, San Francisco, California,
June 18, 1968.

LITTLER, MENDELSON & FASTIFF,
By WESLEY J. FASTIFF,
JAMES A. CARTER,
*Attorneys for Respondent
and Petitioner.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WESLEY J. FASTIFF,
*Attorney for Respondent
and Petitioner.*